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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Nos. 82-437 and 82-635

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA; and ELMER H. WINTER, et al.,

Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA; and JOSEPH N. ALEXANDER, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF OF THE COUNTIES OF BELTRAMI, CASS, HUBBARD, KOOCHICHING, LAKE OF THE WOODS, MARSHALL, AND POLK, MINNESOTA, AS AMICI CURIAE IN SUPPORT OF THE PETITION AND CROSS-PETITION

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TABLE OF CONTENTS

Page

Interest of the Amici Counties 1

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971). 3, 4, 5

Montana v. United States, 440 U.S. 147 (1979) . . . 4

Montana v. United States, 450 U.S. 544 (1981) . . . 3

Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980). 4, 5

State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980). 3, 4

State v. Forge, 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978). 3, 4

United States v. Minnesota, 446 F. Supp. 1382 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980). 3, 4

Treaties and Statutes:

Treaty of February 22, 1855, 10 Stat. 1165 2
Treaty of October 2, 1863, 13 Stat. 667 1
Treaty of May 7, 1864, 13 Stat. 693 2
Treaty of April 7, 1866, 14 Stat. 765 2
Treaty of March 19, 1867, 16 Stat. 719 1
Act of January 14, 1889, 25 Stat. 642. . . . . 1, 2

Congressional Materials:

H.R. Exec. Doc. No. 247, 51st Cong.,
1st Sess. (1890) 1

Miscellaneous:

Executive Order of June 30, 1883 2

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INTEREST OF THE AMICI COUNTIES

The Counties joining herein submit this brief in order to express their interest in the basic issues raised by the Petitioners and to urge that the petition be granted. As explained in the petition, at the heart of this case is the surplus land act of January 14, 1889 (25 Stat. 642), commonly known as the Nelson Act. The significance of this Act is that it provided for the cession of all of the lands of the Chippewa reservations in Minnesota not needed for allotments — twelve reservations in all encompassing close to five million acres in 1889. See, e.g., Pet. at 8; Pet. App. at 52a. See generally H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890).

In addition to the White Earth Reservation (as established by Treaty of March 19, 1867, 16 Stat. 719), among the reservations affected by the Nelson Act were the Red Lake Reservation (as established by the Treaty of October 2, 1863, 13 Stat. 667), essentially all of what

is known as the Greater Leech Lake Reservation,[1] the Bois Fort — or Nett Lake — Reservation (as established by the Treaty of April 7, 1866, 14 Stat. 765), and the Deer Creek Reservation (as established by Executive Order of June 30, 1883). The 1863 Red Lake Reservation encompasses significant portions of the Amici Counties of Beltrami, Lake Of The Woods, Koochiching, Marshall, and Polk; the Greater Leech Lake Reservation encompasses significant portions of the Amici Counties of Beltrami, Cass, and Hubbard; and the 1866 Bois Fort Reservation and the 1883 Deer Creek Reservation encompass a significant portion of Koochiching County.

As will be explained in greater detail below, the primary concern of the Amici Counties is the ultimate interpretation given the Nelson Act, which in turn involves the fundamental problem presented by this case — the relationship of the conflicting case law respecting the disestablishment effect of the Nelson Act. And, of course, the disestablishment issue concerns the Amici Counties because of the effect of reservation status, not only in regard to State and local jurisdiction but, just as importantly, in regard to the governmental

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1. The Greater Leech Lake Reservation includes the historic Leech Lake, Lake Winnebagoshish, Cass Lake, and White Oak Point Reservations as established by the Treaty of February 22, 1855 (10 Stat. 1165), and subsequently modified by the Treaty of May 7, 1864 (13 Stat. 693) and the Treaty of March 19, 1867, supra.

authority of resident bands over non-members as well.[2] See Pet. at 6-7.

ARGUMENT

The Petition makes evident that there exist two conflicting lines of cases respecting the Nelson Act. Pet. at 9-12. On the one side is Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) and its progeny — State v. Forge, 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978),[3] and the state court decision at issue in this litigation, State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980) — in which it was concluded that the underlying purpose of the Nelson Act was not disestablishment. See, e.g., Pet. at 10-11. On the other side are the District Court and the Court of Appeals decisions in United States v. Minnesota, 466 F. Supp.

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2. This latter concern results from the recent trend in the case law recognizing that Indian tribes retain some forms of civil jurisdiction over non-Indians and their lands within reservation boundaries. See, e.g., Montana v. United States, 450 U.S. 544, 565-66 (1981).

3. The reservation area which was at issue in Leech Lake Band and Forge was the Greater Leech Lake Reservation. As pointed out in n.1, supra, this Reservation encompassed not only the area of the original Leech Lake Reservation, but the area of the historic Cass Lake, Lake Winnebagoshish, and the White Oak Point Reservations as well. See, e.g., Leech Lake Band of Chippewa Indians v. Herbst, supra, 334 F. Supp. at 1003.

1382 (D. Minn. 1979), aff'd sub nom. Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980),[4] as well as in this case, in which essentially the opposite conclusion is reached. See, e.g., Pet. at 11-12; Pet. App. at 14a n.5, 29a. It is evident then, that a fundamental conflict as to the proper interpretation of the Nelson Act in the disestablishment context presently exists in the case law.

It is the view of the Amici Counties that the more recent federal decisions — Red Lake Band, United States v. State of Minnesota, and the lower court decisions in this case — effectively overrule the earlier decisions to the contrary. The Counties, therefore, agree with the Petitioners' assertion that these federal decisions constitute a fundamental change in perspective as to the purpose of the Nelson Act. This, we submit, is the type of "major doctrinal shift[ ]" (Montana v. United States, 440 U.S. 147, 162 (1979)), to which the doctrine of collateral estoppel was not intended to apply.

What concerns the Amici is that in applying collateral estoppel in this case, the lower courts refused to recognize that a fundamental shift has occurred. The effect of this is that Leech Lake Band, Forge, and Clark are left intact, and are, therefore, arguably still good

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4. At issue in United States v. Minnesota were those portions of the original Red Lake Reservation ceded under the Nelson Act and a 1904 surplus land act. See Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161, 1162 (8th Cir.), cert. denied, 449 U.S. 905 (1980).

law. A further troubling aspect of what the Amici consider to be an unnecessarily narrow and rigid application of issue preclusion is that it may well result in the very evils the change in law exception is designed to avoid — inequitable treatment, discriminatory distinctions, and litigious confusion. See Pet. at 13-14. Of particular concern to the Amici in this regard is, in view of the fact that the Nelson Act affected some twelve reservations in all, the likelihood that further inequitable treatment will continue.[5] And, although unlikely, this "litigious confusion" could ultimately undermine the favorable decisions regarding the Nelson Act in both Red Lake Band and this case.

The Counties believe that if this Court reverses the lower court and recognizes that the change in law exception is applicable, the steady stream of cases respecting the Nelson Act which have reached this Court in recent years will not likely come to an end. On the other hand, if the problem regarding the proper interpretation of the Nelson Act is not laid to rest in this case, it is probable that the issue will again be

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5. Although the Amici believe that the more recent federal decisions discussed above govern any subsequent examination of the Nelson Act in the disestablishment context, if Leech Lake Band and its progeny are left intact, these latter cases could be found to govern with the federal decisions confined to their facts. Cf. Opinion of the Court of Appeals, Pet. App. at 12a (differing conclusions as to disestablishment of particular reservations result from different fact situations).

presented to this Court in the context of future litigation involving the other historic reservations affected by that Act. In summary, the issues presented by the Petition for Writ of Certiorari are of paramount importance to the Amici Counties. The Counties, therefore, share the concerns of the Petitioners regarding these issues, and adopt the arguments stated therein.

CONCLUSION

For the reasons set forth above, as well as in the Petition, the Amici Counties respectfully urge that Certiorari be granted in order to resolve the important questions presented by this case.

Respectfully submitted,

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